

**National Archives and Records Administration (NARA)
Freedom of Information Act (FOIA) Advisory Committee Meeting**

Meeting Minutes – April 20, 2017

The FOIA Advisory Committee convened at 10:00 a.m. on Thursday, April 20, 2017 in the William G. McGowan Theater at the National Archives Building, 700 Pennsylvania Avenue, N.W., Washington, D.C. 20408-0001.

In accordance with the provisions of Public Law 92-463, the meeting was open to the public from 10:00 a.m. to 1:00 p.m.

Meeting materials are available on the Committee's website at <https://ogis.archives.gov/foia-advisory-Committee/2016-2018-term/Meetings.htm>

Committee members present in the McGowan Theater:

- Alina Semo Chair, Office of Government Information Services, NARA
- Sarah Kotler, Food and Drug Administration
- Chris Knox, Deloitte
- David Pritzker, Administrative Conference of the United States
- Ginger McCall, Department of Labor
- James Valvo, Cause of Action Institute
- Jill Eggleston, U.S. Citizenship and Immigration Services
- Melanie A. Pustay, U.S. Department of Justice
- Michael Bekesha, Judicial Watch
- Stephanie Carr, Department of Defense
- Thomas Susman, American Bar Association
- Lynn Walsh, Society for Professional Journalists
- Sean Moulton, Project on Government Oversight
- Mitra Ebadolahi, American Civil Liberties Union
- Logan Perel, Department of Treasury

Committee members on the phone:

- James Hershberg, George Washington University
- Margaret Kwoka, University of Denver, Sturm College of Law
- Nate Jones, National Security Archive
- Raynell Lazier, Consumer Financial Protection Bureau

Committee members absent from the meeting:

- Helen Foster, Department of Housing and Urban Development

Others present or participating in the meeting:

- Doug Hibbard, Department of Justice
- Amy Bennett, NARA, Committee Designated Federal Officer
- Kel McClanahan, National Security Counselors
- Jason Baron, Drinker Biddle & Reath

Introductions and Announcements

The Archivist of the United States (AOTUS) David Ferriero opened the meeting by welcoming the in-person and on-line audiences. He also reported that the meeting marked the half-way point in the Advisory Committee's two-year term and thanked the Committee members for their efforts thus far. He continued to note that he appointed the Committee's members in recognition of their expertise and range of viewpoints, and that the Committee plays a critical role in understanding the greatest challenges faced in the implementation of FOIA and in the collaborative work to address these issues.

Mr. Ferriero then explained that the purpose of the meeting is to hear updates from its three subcommittees: Search; Efficiencies and Resources; and Proactive Disclosure. He also noted that these three topics underline the profound ways in which technology has changed the government's operations and the public's expectations for access to information, and that addressing these issues is important for charting a path for how FOIA should operate in the future.

Mr. Ferriero then recognized the presence of Jason R. Baron, the National Archives' former Director of Litigation and an expert on the preservation of electronic documents. He then turned over the agenda to the Director of OGIS, Alina Semo, to begin the meeting.

Administration

Ms. Semo welcomed the audience. She thanked the Committee members for their work thus far and expressed her excitement to hear from each of the subcommittees.

Ms. Semo suggested that the meeting begin with introductions by members on the phone and was then told that there might be an issue with the phone. She noted that four Committee members – Mr. Jones, Ms. Kwoka, Mr. Hershberg, and Ms. Lazier – were expected to participate by phone, and that as soon as the phones were working she would ask them to introduce themselves. She also noted that although she had not yet arrived, Ms. Ebadolahi was expected to attend in person.

Ms. Semo then asked each of the members in attendance to introduce themselves and state their affiliation. After introductions, Ms. Semo provided information on how to stay informed about the Committee's work through the Committee's website, as well as through OGIS's blog and Twitter account, and outlined the meeting agenda.

Ms. Semo directed the Committee's attention to the January 26, 2017 meeting minutes. The Committee voted to adopt the minutes.

Ms. Semo then explained that the remainder of the meeting would consist of updates from the Committee's three subcommittees and noted that the agenda also included a presentation by a guest speaker from the Department of Justice.

Proactive Disclosure and Accessibility Subcommittee Update

Ms. Kotler reported that the subcommittee has been interviewing FOIA officers at a handful of agencies of varying sizes regarding their proactive disclosure practices. She said that the topics include the agency's policies and procedures for ensuring posted documents meet the requirements under Section 508 of the Rehabilitation Act for accessibility to people with disabilities; what technologies the agency uses; and how they determine which records to post.

Ms. Kotler said that while they have learned some interesting things about the agencies they have already interviewed, the subcommittee is waiting to draw conclusions regarding trends until they have talked to the remaining agencies.

Mr. Moulton added that some of the agencies that the subcommittee has interviewed reported that they use a waiver system to post records before they are remediated to be accessible to people with disabilities.

Mr. Bekesha asked how many agencies are going to be interviewed and Mr. Moulton and Ms. Kotler responded that there are six agencies on their list, and that three of the interviews are complete. Mr. Moulton and Ms. Kotler also affirmatively responded that they would identify all of the agencies interviewed.

Ms. McCall asked how the agencies were chosen and Ms. Kotler responded that the decisions were made before she joined the Committee but that her understanding was that the decisions were based in part on the size of the agency, the complexity of the requests it receives, and whether the Committee had good contacts at the agencies who could provide them with the information they needed. Mr. Moulton added that some agencies were placed on the list because subcommittee members had heard that they might have some particularly outstanding practices. He also said that the list includes: Environmental Protection Agency, Department of Homeland Security, State Department, Securities and Exchange Commission, and National Archives.

Mr. Susman expanded on Ms. Moulton's comments regarding the use of a waiver system to explain that the subcommittee is particularly interested in finding ways that agencies can be in compliance with the accessibility statute while ensuring that access to the records is not curtailed

or delayed. Ms. Kotler agreed and noted that the waiver systems might be good tools for ensuring compliance with FOIA and the Rehabilitation Act. Mr. Moulton added that agencies reported using the waivers to side-step the technical process of making documents fully accessible to people with disabilities for either a specific time period, or until the agency is asked to provide a fully-accessible version of the record.

Ms. Walsh asked if the interviews consist of set questions. Ms. Kotler responded that there are set subjects, although sometimes the interviews go a little off-script to cover particular areas of interest. Ms. Kotler also added that the interviews do not include all of the subcommittee members, and that there are usually about three people from the subcommittee on each call.

Ms. Semo was informed that the issue with the phone was fixed and she asked for Members on the phone to introduce themselves. After the introductions, Ms. Semo asked Ms. Ebadolahi, who had in the interim joined the group, to introduce herself. She then asked if members on the phone had anything to add to the subcommittee's report.

Ms. Kwoka thanked Ms. Kotler for giving the update and confirmed that agencies were chosen to include a breadth of types of records at issue and to recognize agencies that had a reputation for forward-leaning proactive disclosure policies. She also added that the interviews with the Securities and Exchange Commission and the Department of Homeland Security are completed, and that subcommittee members have been in contact with officials at the other agencies.

Ms. Kwoka stated that she has been impressed by many of the proactive disclosure initiatives at the agencies that the subcommittee has interviewed and noted that both agencies have put resources towards posting all records released under FOIA and that current events drive their decisions about what records to post. She also reported that at both agencies the FOIA staff is responsible for making records meet the technical standards required by Section 508 of the Rehabilitation Act and that they have adopted different strategies for addressing the work.

Ms. Kwoka also elaborated on the basic format of the interviews, explaining that each interview includes questions about: the agency's major proactive disclosure initiatives; the agency's goals when making proactive disclosures; any barriers or hurdles to making proactive disclosures; and the agency's policies and procedures regarding Section 508. She also said that the goal of the subcommittee is to suggest best practices for posting records.

Ms. Kwoka also reported that the subcommittee has had discussions with the National Archives about how they can help kick-off an effort to spur the development of technological tools that lower the burden of making records accessible.

Mr. Hershberg added that he would like to re-affirm the sentiment that compliance with Section 508 of the Rehabilitation Act should not be a barrier to posting records.

Search Subcommittee Update

Ms. Semo thanked the Proactive Disclosure Subcommittee and announced that the Committee would next hear from the Search Subcommittee. She then recognized Ms. Pustay to introduce the

Committee's guest speaker, Doug Hibbard from the Office of Information Policy (OIP) at the Department of Justice (DOJ).

Ms. Pustay invited Mr. Hibbard to the stage and explained that he is a senior advisor on the initial request staff at OIP. She added that his responsibilities include overseeing the processing of FOIA requests that are made to senior leadership offices at DOJ such as the Offices of the Attorney General and the Deputy Attorney General. She also said that Mr. Hibbard had been with OIP since 2009, and as a result he has watched a great deal of the office's transformation from paper to electronic processing first-hand, and was at the forefront of the effort to utilize eDiscovery tools to assist with the office's FOIA processing.

Mr. Hibbard began his presentation by noting that the technology he uses to do his job has changed significantly since his early days at OIP where his primary tool was a black marker. He also noted that the number of requests that the office receives each year has grown, and that the requests have become more complex. He added that the increase in complexity is related in part to advances in technology, and that FOIA staff must now process requests related to technology in which they do not have expertise.

Mr. Hibbard said that requests that include access to emails frequently make what seems like a simple request complex because of the volume of records that are potentially responsive. He explained that eDiscovery tools help process these requests because they allow a user to search across multiple email accounts and have additional sophisticated search functions that allow a FOIA office to have educated discussions about what a requester is really interested in receiving.

As an example, Mr. Hibbard discussed how he might be able to respond to a request for "all records related to Guantanamo Bay." He said that if the original search returned 50,000 records, he could then talk to the requester while using the eDiscovery tool and explain that at least 30,000 of those pages are news articles and he would ask the requester if he could exclude those from the scope of the request. He could then ask the requester about what topics they are really interested in – closure, health conditions, a detainee, etc. – and use the tool to conduct searches and tell the requester how many responsive pages there are to keywords in real time. He said that the tool can allow him to work with a requester to narrow the scope of responsive records to a request that is a much more manageable size.

Mr. Hibbard continued to explain that while useful, eDiscovery tools are not a FOIA processing solution: any responsive records still must be reviewed by a FOIA processor. He also noted that although it is significantly faster than conducting a manual search, it can take a long time to load records into the tool. He also said that while the tool can help weed out duplicate records, it sometimes misses duplicates and will include false hits.

He concluded by saying that his experience shows that the FOIA process works best when there is a symbiotic relationship between a requester and an agency, meaning that they work together to help each other. Mr. Hibbard then invited questions.

Ms. Eggleston asked at what point in the process Mr. Hibbard usually reaches out to the requester to discuss the scope of the request. Mr. Hibbard responded that he finds it can be useful

to talk to the requester when the request is first submitted and/or once the data is already pulled to discuss categories of records. He added that the decisions of when to reach out to the requester depends a good deal on the nature of a request.

Ms. Eggleston also asked if the eDiscovery tool is used primarily with requests for email. Mr. Hibbard answered that it is primarily used for requests for email, but can also be used if responsive records are stored in a shared drive. He explained that it cannot be used to search certain databases, like OIP's centralized official correspondence database; he added, however, that this database is easily electronically searched using key words.

Mr. Pritzker asked how the use of the tool impacts OIP's implementation of a policy that calls for the agency to post online all non-first party records that are released under FOIA. He further explained his question by asking if OIP posts some sort of a description of how the documents were filtered. Mr. Hibbard referred to Ms. Pustay for a response and Ms. Pustay said that the main goal of the policy is to build a repository of released records that someone can search prior to making his or her own request. Mr. Pritzker furthered his inquiry by asking if agencies should make any effort to give requesters context about the record by somehow linking it to the request. Ms. Pustay responded that it is up to an agency to determine how posted records should be displayed when implementing the policy; she also noted that agencies should include at least a minimal amount of information so that the records make sense to someone looking at the webpage and noted that the searchability of records is another key facet of the policy.

Mr. Susman asked how transparent Mr. Hibbard is about how the eDiscovery tool works and how the search was conducted, including any keywords used. Mr. Hibbard responded that if a requester asks him to use particular keywords, he will. He added that when he pulls the initial batch of responsive records, he tries to make the search as broad as possible so that he does not miss anything.

Mr. Susman asked Ms. Pustay how OIP has tried to push out the use of these tools to other agencies. Ms. Pustay responded that they have issued best practices related to the use of eDiscovery tools. She added that collaboration and communication with a requester is critical to being able to use the eDiscovery tools effectively.

Mr. Knox stated that there are several similarities between the FOIA and discovery processes and that vendors are beginning to create eDiscovery tools that have been modified to better serve FOIA offices. He also noted that these tools can help processors identify potential personally identifiable information like Social Security Numbers or other sensitive information.

Ms. Carr asked Mr. Hibbard to provide some additional details about how the tools work. Mr. Hibbard explained that the version he uses is web-based, which means that once the records are loaded he can access them from any secure connection. He said that the only software that had to be installed to use the tool is a viewer.

Mr. Bekesha asked how much the tool costs. Mr. Hibbard explained that he is not certain about the cost because OIP did not have to make the initial purchase; the eDiscovery tools had already been purchased by the Civil and Justice Management Divisions. Ms. McCall asked if Mr.

Hibbard can follow up internally and supply the Committee with cost information. Mr. Hibbard responded that he would do so.

Mr. Knox noted that many agencies have access to eDiscovery tools and encouraged FOIA offices to reach out to their legal divisions to see if they can leverage existing purchases.

Ms. Walsh asked if there are any agencies that do not have access to eDiscovery tools or who have access, but are not using them. Ms. Pustay responded that OIP has asked agencies to report on this topic in Chief FOIA Officer Reports. She added that small agencies, particularly those that do not engage in much litigation, are less likely to have the tools.

Mr. Perel noted that the subcommittee had discussed asking agencies for data about the tools they use to conduct searches. Ms. Pustay responded that she would be happy to discuss including a more targeted question in the next iteration of the Chief FOIA Officer Report with the subcommittee.

Mr. Moulton asked if program staff had raised any concerns about allowing the FOIA staff to search their records. Ms. Pustay responded that it is very common to hear this concern and added that the FOIA office has a responsibility to be careful about protecting personal or sensitive information. She went on to say that OIP has been able to overcome these concerns because they have good long-standing relationship with their programs. She also said that one of the main selling points of the tool is the efficiency it creates for program staff by relieving them of the responsibility to search for responsive records.

Mr. Knox noted that many of these tools have been integrated into cloud storage solutions, and encouraged any agency that has migrated to the cloud to see if they have access to these tools.

Mr. Perel asked if Mr. Hibbard consults with any Subject Matter Experts (“SMEs”) in the agency about the search. Mr. Hibbard responded that OIP uses dynamic searching so that they do not miss any records. He explained further by describing the search for records regarding Khalid Sheikh Mohammed. He said that they used several variations on his name and found that they kept on finding responsive documents that did not contain his name; he added that they then discovered people were using his initials “KSM” and added that to their search terms.

Ms. Semo asked how often OIP receives requests for paper records. Mr. Hibbard responded that paper records are much less common now that many workflows are electronic. He continued to say that if they think that there might be paper records that are responsive, they ask the custodian of the records to conduct the search.

Ms. McCall asked if the eDiscovery tools are ever used on records that are a part of a Privacy Act System of Records; and, if so, whether DOJ has published a System of Records Notice. Mr. Hibbard responded that he was not aware of a situation like that.

Mr. Jones asked if the eDiscovery tools ever find documents that would not have been found if the search was conducted another way. Mr. Hibbard responded that he could not answer that

question because it is impossible to know what might have been found using a different tool or search method.

Ms. Lazier asked what eDiscovery tools Mr. Hibbard has used. He said that he has used Relativity, Clearwell and Concordance, and added that he used Google to search for eDiscovery tools that morning and had found more than 85 providers. He also said that while the different eDiscovery tools have specific features and interfaces, they all have all done the job he needed them to do.

Ms. Semo thanked Mr. Hibbard and then asked Mr. Perel to provide an update on the subcommittee's work.

Mr. Perel reported that the subcommittee met a few weeks earlier and re-affirmed their goal of highlighting search practices that are working well. He also noted that the results of a survey regarding agency searches for records in the FOIA process conducted by the National Security Archive and the Project On Government Oversight (POGO) was in each Committee member's folder. He also said that the subcommittee might conduct case studies and invite people to present on other technological solutions.

Mr. Jones added that the subcommittee has discussed recommending that agencies consider the implications of FOIA before purchasing any technology. He also noted that the National Security Archive/ POGO survey results indicate that search is a major bottleneck in the FOIA process; he continued to say that one of the effective ways to address this bottleneck is to give FOIA offices the capability to conduct more searches rather than relying on program staff to conduct searches.

Ms. Eggleston said that the subcommittee had also discussed a recommendation on using FOIA performance standards for program staff. Ms. Pustay responded that OIP has developed performance standards for non-FOIA professionals and added that the Assistant Attorney General sent out a memo encouraging their adoption.

Ms. Semo thanked the subcommittee for the update and announced that they would take a short break before hearing the last subcommittee update and public comments.

Efficiencies and Resources Subcommittee Update

Ms. Semo welcomed the audience back and invited Ms. McCall to update the Committee on the Efficiencies and Resources Subcommittee's work.

Ms. McCall reported that the subcommittee has been meeting on a biweekly basis and that Mr. Moulton has assisted the subcommittee by pulling data from agency annual FOIA reports for the subcommittee to examine. She added that based on their analysis of the data, the subcommittee has chosen five agencies that process a large volume of requests (more than 10,000 requests annually) and five agencies that process a medium volume of requests (500 to 9,999 requests annually) that the subcommittee believes is making efficient use of its resources.

Ms. McCall said that the large agencies are: Office of Personnel Management, Department of Treasury, Department of Homeland Security, Environmental Protection Agency, and the

Department of Labor. She also identified the medium agencies as: Department of the Interior, Pension Benefit Guaranty Corporation, Consumer Product Safety Commission, National Aeronautics and Space Administration, and the Federal Trade Commission. She also explained that they plan to identify components at the larger agencies to interview, and that subcommittee members were reading the agencies' annual reports to see if they have reported any initiatives that are noteworthy.

Ms. McCall explained that the subcommittee evaluated several metrics from the annual report data, including the number of requests processed per FOIA employee, the average cost per processed request, and the complexity of the agency's requests, to identify the agencies. She then reported that the next step is to set up interviews with the agencies and identify trends and best practices. She also noted that the subcommittee is now brainstorming to select questions for the interviews and welcomed any suggestions.

Ms. Semo thanked Ms. McCall and announced that Ms. Pustay would be making a special announcement before the floor was open for public comments.

Special Announcement

Ms. Pustay reported that OIP has engaged 18F, the digital services agency modeled after start-ups and located within the General Services Administration, to build the National FOIA Portal. She added that OIP worked with the Office of Management and Budget (OMB) to secure funding for the project through the Cross-Agency Priority Goal process. She added that OIP has set up a dedicated email address to allow stakeholders to volunteer to meet with 18F to discuss the greatest needs and technical solutions.

Ms. Pustay continued to say that one of the possible features of the National FOIA Portal is the ability for FOIA requesters to search for records that have been released on a topic by any agency.

Ms. Walsh asked how much funding was secured. Ms. Pustay responded that with OMB's assistance, OIP secured \$1.3 million for the initial development of the National FOIA Portal. She noted that it will take additional funding to maintain the portal and that they will continue to work with OMB to determine how to meet that need.

Mr. Pritzker asked if they are looking for feedback from agency personnel and FOIA requesters. Ms. Pustay said that they would like participation from inside and outside of government. She added that they are interested in thoughts from both because they want to make sure it meets the needs of both parties.

Public Comments

Mr. McClanahan commented that he is having an ongoing issue with respect to requests that involve emails. He said that he sent identical requests to several agencies and that while half contacted him to discuss possibly narrowing the request, the other half responded by saying the request was overbroad and that the agency would administratively close the request within 10

days unless he contacted them to provide clarification. Ms. Pustay recommended that Mr. McClanahan discuss the issue with the OIP Compliance Team.

Mr. Baron stated that he is heartened to learn that the search for records is one of the issues the Committee is addressing and agreed with Mr. Hibbard that the number of responsive records increases significantly if the requester wants emails. He added that other messaging mediums like text will have similar implications in the future, and that the volume of responsive records that agencies generate will also increase as agencies begin managing records electronically as required by NARA's Records Management Directive. He continued to say that there are new technologies including predictive coding and technology-assisted review that can help lower the burden of processing electronic records and urged the Committee to connect with other practitioners in the field to learn more about how these tools can work for FOIA offices.

Closing Remarks

Ms. Semo thanked the audience and the meeting was closed.

I certify that, to the best of my knowledge, the foregoing minutes are accurate and complete on May 18, 2017.

Amy Bennett
Designated Federal Officer, 2016-2018 Term

Alina M. Semo
Chair